June 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Prior Testimony.

Insert the following text before the last paragraph on page 112:

A witness' statement identifying the defendants for police is a testimonial statement under *Crawford v Washington*, 541 US 36 (2004). In *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005), the defendants were convicted of several counts relating to a bank robbery. During the trial, a police officer testified that a witness identified pictures of the defendants during the witness' interview with police. The witness never testified at trial, and it is unclear whether she was unavailable or simply absent. The United States Court of Appeals for the Sixth Circuit concluded that the statement was given during a formal police interrogation, and a reasonable person would anticipate that the statement would be used against the accused for investigation and prosecution. Therefore, the statement was testimonial in nature. Further, the statement was offered for the truth of the matter asserted – that the defendants were in fact the men in the picture.

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

2. Actual Costs

Add the following text to the end of the second full paragraph on page 202:

In *Haliw v City of Sterling Heights (On Remand)*, ___ Mich App ___ (2005), the Court of Appeals analyzed the "interest of justice" exception under MCR 2.403(O)(11). The Court relied upon the analysis in *Luidens v 63rd Dist Court*, 219 Mich App 24 (1996), that addressed the "interest of justice" exception for purposes of sanctions under MCR 2.405(D)(3). The Court quoted its earlier opinion in *Haliw v City of Sterling Heights,* 257 Mich App 689, 706-709 (2003). Examples where the exception may apply include where an issue of first impression is involved, where the law is unsettled and substantial damages are at issue, where significant financial disparity exists between the parties, or where third persons may be significantly affected. *Haliw, supra* at 707, quoting *Luidens, supra* at 36. "Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception." *Haliw, supra*, quoting *Luidens, supra.*

The trial court did not err in denying case evaluation sanctions based upon the "interest of justice" exception where the defendant's decision to wait until after the close of proofs to move for a directed verdict based on a viable defense caused the "plaintiff and the court to expend time and resources on litigation that might have been unnecessary at the outset." *Harbour v Correctional Medical Services, Inc*, ___ Mich App ___, ___ (2005). The trial court found that the "defendant's actions constituted 'gamesmanship' that was unnecessarily costly to plaintiff, making it unjust for defendant to recover expenses it elected to create[.]" *Id.*

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

3. Costs Taxable in Any Civil Action—MCR 2.403(O)(6)

On page 203 immediately before sub-subsection (4), insert the following text:

In *Fansler v Richardson*, ___ Mich App ___, ____ (2005), the Court of Appeals found that a defendant is not a "prevailing party" entitled to costs from another co-defendant where the co-defendant filed a notice of nonparty fault against the defendant. In *Fansler*, the plaintiff filed a wrongful death action against IPF. IPF then filed a notice of nonparty fault pursuant to MCR 2.112(K) against the defendants Gibler and Thermogas. Summary disposition was granted in the defendants' favor, and they sought costs from co-defendant IPF. The Court of Appeals held that defendants Gibler and Thermogas were not "prevailing parties" against co-defendant IPF under MCR 2.625. The Court reasoned that "[t]he ultimate issue of fault stemming from the resolution of the [dispute] would have benefited defendants Gibler's and Thermogas' position against *plaintiffs*, but not against co-defendant IPF. Therefore, because defendants Gibler and Thermogas had no vested right to recover from co-defendant IPF, they could not be considered a 'prevailing party' under MCR 2.625 against IPF, and they had no right to tax costs against IPF." *Fansler, supra* at ___.

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.56 Costs

A. Authority

On page 243 immediately before subsection (B), insert the following text:

In *Fansler v Richardson*, ___ Mich App ___, ____ (2005), the Court of Appeals found that a defendant is not a "prevailing party" entitled to costs from another co-defendant where the co-defendant filed a notice of nonparty fault against the defendant. In *Fansler*, the plaintiff filed a wrongful death action against IPF. IPF then filed a notice of nonparty fault pursuant to MCR 2.112(K) against the defendants Gibler and Thermogas. Summary disposition was granted in the defendants' favor, and they sought costs from co-defendant IPF. The Court of Appeals held that defendants Gibler and Thermogas were not "prevailing parties" against co-defendant IPF under MCR 2.625. The Court reasoned that "[t]he ultimate issue of fault stemming from the resolution of the [dispute] would have benefited defendants Gibler's and Thermogas' position against *plaintiffs*, but not against co-defendant IPF. Therefore, because defendants Gibler and Thermogas had no vested right to recover from co-defendant IPF, they could not be considered a 'prevailing party' under MCR 2.625 against IPF, and they had no right to tax costs against IPF." *Fansler, supra* at ___.

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.58 Sanctions

D. Frivolous Claim or Defense

On page 248 after the second paragraph, insert the following text:

A trial court properly ordered sanctions against the plaintiffs and the plaintiff's attorney where the court determined that the plaintiffs "knew at the outset" of litigation that the claims were frivolous and proceeded anyway. *BJ's & Sons Const Co, Inc v Van Sickle*, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.8 Information

B. Amendments

Insert the following language after the second paragraph on page 291:

See also *People v Russell*, ___ Mich App ___, ___ (2005) (the defendant was not unfairly surprised or deprived of adequate time to prepare a defense against a charge when the charge added to the amended information was a charge presented at the defendant's preliminary examination and had been struck from the information in an earlier amendment).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.12 Motion to Suppress Identification of Defendant

A. Generally

Insert the following text at the bottom of page 306:

If the totality of circumstances support the reliability of a witness' pretrial identification and that reliability outweighs any improper suggestiveness, the pretrial identification is properly used to advance the witness' identification of the defendant at trial. *Howard v Bouchard*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

5. Consent

Insert the following text after the quoted paragraph at the top of page 342:

Where the traffic stop and resulting detention were reasonable, no Fourth Amendment violation occurred and no inquiry was needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." Consequently, the defendant's consent to search his vehicle under the circumstances was valid and the evidence obtained was properly admitted against the defendant at trial. *People v Williams*, 472 Mich 308, 310 (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following text after the March 2005 update to page 348:

Whether an officer's reliance on a search warrant is objectively reasonable is determined by the information contained in the four corners of the affidavit; therefore, the decision whether the good-faith exception to the exclusionary rule applies to evidence seized pursuant to an invalid warrant must be made without considering any information known to an officer but not found in the affidavit. *United States v Laughton*, ___ F3d ___, ___ (CA 6, 2005).

In *Laughton*, the good-faith exception was inapplicable because the affidavit failed to establish even a remote connection between the place to be searched and the criminal conduct prompting the search. The Sixth Circuit noted that the warrant

> "failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit. Th[e] affidavit also failed to indicate any connection between the defendant and the address given or between the defendant and any of the criminal activity that occurred there." *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.22 Automobile Searches

C. Probable Cause to Search an Automobile

Insert the following case summary after the March 2005 update to page 350:

Under the circumstances presented in *People v Williams*, 472 Mich 308 (2005), no probable cause was necessary to justify the officer's questions and because the detention was reasonable, the defendant's consent to the search of the vehicle was valid. Where the traffic stop and resulting detention are reasonable, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id*. at 318.

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about the driver's destination and travel plans. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Id*. at 316.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

B. Standing

Insert the following case summary on page 353, immediately before subsection (C):

Under Michigan law, a trespasser has no legitimate expectation of privacy in a dwelling house even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

B. Traffic Stop

Insert the following case summary on page 356, immediately before subsection (C):

Where the initial traffic stop is justified and the officer's questions do not exceed the scope of the stop and do not unreasonably extend the time of the detention, a defendant's consent to search the vehicle is valid. *People v Williams*, 472 Mich 308, 310 (2005). Under those circumstances, no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id*. at 318.

In *Williams*, the defendant was stopped by a Michigan State Police trooper for speeding. After the defendant produced his driver's license, the trooper asked where he and his two passengers were going. The defendant's answer raised the trooper's suspicion because it was implausible. Answers the defendant and the two passengers gave to the trooper were inconsistent and served only to increase his suspicions. At one point during the encounter, the defendant admitted to a previous arrest "for a marijuana-related offense." Following the five- to eight-minute detention, the trooper asked for and received the defendant's consent to search the vehicle. A canine unit arrived within three minutes, and the dog indicated that narcotics were present in the vehicle's backseat. No drugs were found there, and the defendant consented to a search of the vehicle's trunk. When the defendant later withdrew his consent, the trooper obtained a warrant, searched the trunk, and discovered marijuana and cocaine. *Id*. at 310–312.

The *Williams* Court conducted "a fact-intensive inquiry" pursuant to the standards set forth in *Terry v Ohio,* 392 US 1 (1968). According to the *Terry* standard,

> "the reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Williams, supra* at 314. [Internal citations and footnotes omitted.]

The Court explained that a law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about the driver's destination and travel plans. The officer's authority to ask questions extends to follow-up questions prompted by a driver's suspicious or implausible answers to questions posed by the officer. *Id*. at 316.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

A. Res Gestae Witnesses List with Information

Replace the second paragraph beginning at the bottom of page 380 with the following text:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be res gestae witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995). The Court elaborated:

> "Because [*People v*] *Pearson*[, 404 Mich 698 (1979)] mandated hearings for the prosecution's breach of a duty that MCL 767.40a abolished, we hold, in answer to the question posed to us by our Supreme Court, that *Pearson* is no longer good law.[6] We further hold that an evidentiary hearing is no longer *required* simply because the prosecution did not produce a res gestae witness.

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[6] We note that there may be times when such a hearing may be appropriate. For example, MCL 767.40a(5) does require the prosecution to provide reasonable assistance in locating witnesses whose presence defendant specifically requests. A hearing of the type described by our Supreme Court in *Pearson* might be appropriate if the prosecution is found to have breached this duty."

Cook, supra at ___.

4.30 Witnesses—Disclosure and Production

D. Locating and Producing Witnesses

Replace the second full paragraph on page 382 with the following text:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be res gestae witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995).

E. Evidentiary Hearing

Replace the text on pages 382–383 with the following:

A prosecutor is not statutorily obligated to locate, endorse, and produce unknown witnesses who might be res gestae witnesses; a prosecutor does have a statutory duty to give notice of any known witnesses and provide reasonable assistance to locate a witness when requested by a defendant. *People v Cook*, ___ Mich App ___, ___ (2005), citing *People v Burwick*, 450 Mich 281, 289 (1995). The Court elaborated:

> "Because [*People v*] *Pearson*[, 404 Mich 698 (1979)] mandated hearings for the prosecution's breach of a duty that MCL 767.40a abolished, we hold, in answer to the question posed to us by our Supreme Court, that *Pearson* is no longer good law.[6] We further hold that an evidentiary hearing is no longer *required* simply because the prosecution did not produce a res gestae witness.
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> [6] We note that there may be times when such a hearing may be appropriate. For example, MCL 767.40a(5) does require the prosecution to provide reasonable assistance in locating witnesses whose presence defendant specifically requests. A hearing of the type described by our Supreme Court in *Pearson* might be appropriate if the prosecution is found to have breached this duty."
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> *Cook, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the first full paragraph on page 450:

Although the ameliorative changes made to the sentencing provisions in MCL 333.7401 do not apply retrospectively, a sentencing court should consider whether it is appropriate to tailor a defendant's sentence to reflect the Legislature's more lenient sentencing policy. *People v Michielutti*, ___ Mich App ___, ___ (2005). In addition to any other proper factors, "the new, ameliorative legislative policy qualifies as an objective and verifiable reason to deviate from the former mandatory sentence" and may contribute to the substantial and compelling reasons for a court's departure from a previous mandatory sentence. *Id*. at ___.

D. Imposition of Sentence

Insert the following text at the bottom of page 450:

When a defendant presents (at his or her sentencing hearing) objective and verifiable factors in support of a downward sentence departure, the court must address on the record all applicable factors raised and indicate whether any of the factors influenced the court's ultimate sentencing decision. *People v Michielutti*, ___ Mich App ___, ___ (2005). According to the *Michielutti* Court, "the seriousness of imposing a mandatory ten-year sentence compels some measure of reasonable disclosure[.]" *Id*. at ___, citing *People v Triplett*, 432 Mich 568, 572–573 (1989).

CHAPTER 5

Appeals & Opinions

Part I—Rules Governing Appeals to Circuit Court (MCR Subchapter 7.100)

5.1 District Court

C. Motions for Rehearing or Reconsideration

On page 483, insert a new subsection (C) containing the following text:

A circuit court, acting as an appellate court in review of a district court order or judgment, possesses the authority to reconsider its own previous order or judgment on the matter. *People of the City of Riverview v Walters*, ___ Mich App ___, ___ (2005).

Palpable error is not a mandatory prerequisite to a court's decision to grant a party's motion for reconsideration. *Id*. at ___. Adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration. *Walters, supra* at ___.

Where a different judge is seated in the circuit court that issued the ruling or order for which a party seeks reconsideration, the judge reviews the prior court's factual findings for clear error. *Id*. at ___. The fact that the successor judge is reviewing the matter for the first time does not authorize the judge to conduct a de novo review. *Id*. at ___.

CHAPTER 5

Appeals & Opinions

Part II—Tools for Deciding Appeals to Circuit Court

5.9 Law of the Case

B. Law of the Case

Insert the following text after the second paragraph on page 500:

The law of the case doctrine does not apply to trial courts; a trial court possessed unrestricted discretion in reviewing prior decisions made by the court. *Prentis Family Foundation v Karmanos Cancer Institute*, ___ Mich App ___, ___ (2005).